UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 3

BATTISTONI ITALIAN SPECIALTY MEATS, LLC

Employer

and **Case 03-RD-155217**

HELENE WEST

Petitioner

and

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, DISTRICT UNION LOCAL ONE

Union

DECISION AND ORDER

On July 1, 2015, Helene West (Petitioner) filed a petition seeking to decertify the United Food and Commercial Workers International Union, District Union Local One (Union)[1] as the exclusive collective-bargaining representative of the employees in the bargaining unit described herein.[2] At issue is whether a non-Board settlement agreement between the Union and Employer bars the processing of the petition. [3] The Union contends that the petition should be dismissed because the settlement bar precludes an election. Battistoni Italian Specialty Meats, LLC (Employer) and the Petitioner contend that there is no bar to an election because there has been a reasonable period of time for bargaining and the petition should be processed. As discussed

[1] At the hearing, all parties stipulated to amend the record to reflect the correct name of the Union as captioned above.

[2] The parties stipulated that the bargaining unit (Unit) is:

> All part-time and full-time production associates and truck drivers at the Employer's facility located at 81 Dingens Street, Buffalo, New York, but excluding all casual associates, managerial associates, quality control associates, office and clerical associates, sales staff, guards, and supervisors as defined by the National Labor Relations Act.

[3] At the hearing, the bar was referred to as a "contract bar." The accurate term as used herein is "settlement bar." The parties stipulated that the sole issue in dispute is whether there is a bar to processing the petition.

below, based on the record, and relevant Board law, I conclude that a reasonable time for bargaining has not elapsed and the petition is barred. Accordingly, I shall dismiss the petition.

I. FACTS

The Union has been representing the Unit for a period of time undisclosed in the record. Providential Foods Corporation (Providential) operated the Dingens Street facility immediately before the Employer purchased the assets. Providential and the Union were parties to a collective-bargaining agreement covering the Unit with effective dates of May 1, 2011 to May 1, 2014. In April 2014, the Employer purchased substantially all the assets of Providential and hired a number of the existing bargaining unit employees who were represented by the Union. Thereafter, the Union filed unfair labor practice charges alleging that the Employer, among other things, violated Section 8(a) (1) and (5) of the Act by refusing to recognize and bargain with the Union. The parties settled the charges on September 4, 2014 with a private non-Board settlement agreement requiring the Employer to recognize the Union as the exclusive collective-bargaining representative of the Unit and bargain with the Union regarding employees' terms and conditions of employment. Currently, the Unit includes about 18 employees.

The Union and the Employer held 11 bargaining sessions with the first session on October 14, 2014 and the last session on June 22, 2015.[4] In the course of negotiations, both parties changed their lead negotiator. At the fourth session, held on December 22, 2014, Robert Boehlert, the Union's Director of Collective-Bargaining, appeared at negotiations for the first time and became the Union's lead negotiator. It also appears that at some point, one of the Union's negotiators, Roger Hemmit, was replaced by Jeff Morrin. Similarly, at the tenth session held on May 20, 2015, Ginger Schroder, the Employer's counsel, appeared at the negotiations for

[4] The record reveals that the parties met on October 14, November 6, 17, December 22, 2014, January 15, February 22, March 31, April 29, May 5, 20 and June 22, 2015. The record also reveals that the Employer cancelled three sessions, scheduled for February 9, May 4 and July 9, 2015.

the first time and became the Employer's lead negotiator.[5] Each session began at 4:00 p.m. to permit the three employee members of the Union's bargaining committee to attend the sessions. Initially, at each session the parties bargained for no more than two hours per session. The final two sessions, lasted between three to five hours.

During negotiations, the parties used the prior collective-bargaining agreement in effect at the facility as a template and by doing so reached agreement on 18 non-economic issues. Specifically, the parties agreed on the following issues: jurisdiction, management rights, union security, union access, seniority, job vacancies, job postings, non-discrimination, no strike/no lockout, separability, laundry, tools, credit union deductions, union dues remittance, health and safety, union stewards and a probationary period for employees. They also agreed to establish a policy concerning drug and alcohol testing. There are only a few non-economic issues that are outstanding including the leave policy and job classifications.

The parties have not started to negotiate about economic issues, including wages, retirement benefits and health care. While negotiations on these topics have not commenced, the parties have exchanged proposals and the Union agreed to withdraw its proposal requiring that unit employees participate in its pension fund.

The Union asserts that negotiations have been hindered by the Employer's failure to allow a Union representative access to the facility, which was the subject of an unfair labor practice charge filed on March 26, 2015, in Case 03-CA-148883. According to the Union, a lack

[5] The Employer also had two consultants, Bob Cicamillo and Don Kantner, who attended negotiating sessions. The record reflects that Mr. Cicamillo and Mr. Kantner were experienced in collective-bargaining negotiations. After the third session, the Employer's former lead negotiator, Larry Oppenheimer, ceased attending the sessions.

of access to the Employer's facility prevented its representatives from speaking to its members to apprise them of the status of negotiations and to service the membership.[6]

II. THE SETTLEMENT BAR DOCTRINE

The sole issue presented is whether the parties' private non-Board settlement, by which the Employer agreed to recognize and bargain with the Union, bars the processing of the petition.

The settlement bar doctrine was established by the Board in *Poole Foundry and Machine Company*, 95 NLRB 34, 36 (1951), enfd. 195 F.2d 740 (4th Cir. 1951). In *Poole Foundry*, the Board stated "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a reasonable time in which to conclude a contract." *Id.* at 36. Accordingly, the parties are given a reasonable period for bargaining in which the Union's majority status cannot be challenged.[7] This principle is applicable to non-Board settlement agreements. *See Van Ben Industries,* 285 NLRB 77, 78-79 (1987); *VIP Limousine*, 276 NLRB 871 (1985); *Mammoth of California, Inc.*, 253 NLRB 1168 (1981).

In determining whether the parties have bargained for a reasonable period of time, a single factor is not determinative. Rather, there are a number of relevant factors. The Board considers (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining procedures; (3) the total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; (4) the

[6] I take administrative notice that the Region found merit to the charge, and on July 16, 2015, the Regional Director approved a unilateral settlement agreement between the Regional Director and the Employer. The Union did not request to block the processing of the instant petition based on this unfair labor practice charge. I also take administrative notice, however, that on July 29, 2015 the Union filed a request to block the petition based upon the alleged supervisory status of the Petitioner. In light of my decision to dismiss the petition there is no need to block it.

[7] In situations where the parties are obligated to bargain as a successor employer, *see UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011), or by voluntary recognition, *see Americold Logistics, LLC,* 362 NLRB No. 58 (March 31, 2015), or pursuant to a Board Order, *see Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001), a reasonable period of time before the union's status as the employees' bargaining representative can be challenged is no less than 6 months and no more than 1 year. However, a specific time period has not been set forth for situations involving bargaining pursuant to a settlement agreement. *See Lee Lumber & Building Material Corp.,* 334 NLRB at 399 n. 7. *See also Poole Foundry and Machine Company*, 95 NLRB 34 (1951).

amount of progress made in negotiations and how near the parties are to an agreement; and (5) whether the parties are at a bargaining impasse. *AT Systems West, Inc.*, 341 NLRB 57, 61 (2004), citing generally *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001). In applying these factors, I find that a reasonable period of time for bargaining has not elapsed.

The first factor considered by the Board weighs against finding that a reasonable time for bargaining has elapsed as the parties are bargaining for an initial contract. *Lee Lumber,* supra, at 403. The Board recognizes that parties bargaining for an initial contract are likely to need more time to reach an agreement than when bargaining for a renewal contract. *Id*. The Board reasons that the parties bargaining an initial contract have to establish basic procedures and core terms and conditions of employment. *Id*. Accordingly, as the Employer and Union are bargaining for an initial contract, which includes bargaining over establishing job classifications and a drug testing policy, this factor weighs in favor of finding a settlement bar to processing the petition.

The second factor considered by the Board, is the complexity of issues. In this case, the issues being bargained and the bargaining process itself are not complex. *Lee Lumber,* supra, at 403. Here, the Employer and the Union streamlined their negotiations by using the facility's prior collective-bargaining agreement as a template for bargaining. The record also failed to identify any complex issues being negotiated. Therefore, this factor weighs against finding a settlement bar.

The third factor examined by the Board, the time elapsed and the number of bargaining sessions, weighs against finding that a reasonable time has passed. The Board recognizes that the parties have a greater opportunity to reach an agreement where more time has passed and where the parties have participated in a greater number of negotiating sessions. *Lee Lumber*, supra, at 404. Here, while the parties have been bargaining for nine months, in over 11 sessions,

the Union changed its lead negotiator after three sessions, and after nine sessions the Employer changed its lead negotiator. The Board, in a different context, has recognized that a change in negotiators can be an important factor impacting collective-bargaining negotiations. *See Airflow Research & Mfg. Corp*., 320 NLRB 861 (1996) (entrance of new union representative into stagnant bargaining situation creates a change sufficient to dissolve impasse). Here, the Employer's new lead negotiator only began to participate in negotiations during the second to last bargaining session, and her presence has already resulted in longer bargaining sessions (from no more than two hours per session to between three to five hours per session). This change in negotiators demonstrates that additional progress is a real possibility. In addition, as noted above, the Employer cancelled three sessions and, until recently, the bargaining sessions were at most two hours long. I conclude that the bargaining process has not had a fair chance to succeed given the abbreviated bargaining sessions coupled with the changes in the chief negotiators. I also take into account the fact that a good part of the negotiations occurred in the context of the unfair labor practice charge referenced above, which the Union asserts hindered bargaining as it was denied access to the facility to speak to employees about negotiations. The unilateral settlement agreement which provides the Union access to the facility for bargaining discussions was only recently approved, and negotiations will resume in an environment without unremedied unfair labor practices. The above changes in the bargaining landscape will likely provide more opportunities for the parties to reach a contract. Accordingly, this factor weighs in favor of finding a settlement bar.

The fourth factor considered by the Board, the parties' proximity to reaching an agreement, does not favor either finding. In *Lee Lumber,* the Board reasoned that "progress (or lack of progress) toward reaching a contract is relevant to whether a reasonable time for

bargaining has elapsed, because it can indicate whether the bargaining process has had a fair chance to succeed." *Lee Lumber* at 404 (internal quotations omitted). The Board reasoned that this factor depends on the context of the negotiations. Thus, where the parties have bargained for over six months in numerous negotiating sessions and are still not close to reaching a contract, "giving them a bit more time" for negotiations is unlikely to result in an agreement and a reasonable time for bargaining has therefore elapsed. *Lee Lumber*, supra, at 404-405. Here, as detailed above, both parties changed their lead negotiators which may have complicated their reaching an agreement. In addition, the Union asserts its access to employees at the facility impeded bargaining. Despite this, the parties made progress in negotiations by reaching agreement on the majority of the non-economic issues. The parties have not begun to bargain about economic issues, including wages, retirement benefits and health care. It is reasonable to conclude however, that with more bargaining sessions and consistent lead negotiators, the parties may complete a contract. Accordingly, in these circumstances, given the context of the negotiations, the proximity to agreement is not easy to gauge and therefore does not favor either finding.

Finally, there is no impasse in negotiations. This fifth factor under *Lee Lumber* favors a finding that the parties have not had a reasonable amount of time to bargain. The Board recognizes that the absence of an impasse favors such a finding while its presence favors an opposite finding. *See Lee Lumber*, supra, at 404. Accordingly, this factor weighs in favor of finding a settlement bar.

In sum, I find that under the circumstances of this case, a reasonable period of time for bargaining has not elapsed since negotiations began. In making this finding, I rely on all the applicable factors, and, in particular, that the parties are bargaining for an initial contract and are

not at impasse. The bargaining sessions have been conducted with changes in negotiators and during a time where the Union asserts its lack of access to employees to discuss negotiations impeded bargaining, and the bargaining sessions have been relatively short until recently. The record demonstrates that progress in negotiations has been made and will probably continue. These factors outweigh the countervailing consideration that the parties did not encounter particular bargaining complexities. Thus, the parties have not had a reasonable time to conclude a contract. Accordingly, I find that there is a settlement bar to the petition and I shall therefore dismiss it. *See AT Systems West, Inc.*, 341 NLRB 57, 61 (2004); *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001).

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I find and conclude as follows:

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The Union is a labor organization within the meaning of Section 2(5) of the Act.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

IV. ORDER

It is hereby ordered that the petition is dismissed.

V. RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by **August 14, 2015**.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated, the 31st day of July, 2015.

/s/Rhonda P. Ley

RHONDA P. LEY
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 03
130 S Elmwood Ave Ste 630
Buffalo, NY 14202-2465